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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 ALFRED VICARIO,

12 Petitioner,

13 vs.
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15 UNKNOWN,

16 Respondent.
17

Civil No. 10cv1752-JLS (JMA)

ORDER:

**(1) DENYING MOTION FOR
APPOINTMENT OF COUNSEL;
AND**

**(2) DISMISSING CASE WITHOUT
PREJUDICE**

18 Petitioner, a state prisoner proceeding pro se, has submitted a document titled "Motion
19 for Appointment of Counsel for State Habeas Proceedings," which has been docketed as a
20 Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254.

21 Petitioner has not filed a Petition for a writ of habeas corpus in this action. Therefore,
22 unless Petitioner is a capital prisoner, he has not initiated habeas proceedings in this Court.
23 Calderon (Nicolaus) v. United States District Court, 98 F.3d 1102, 1107 n. 3 (9th Cir. 1996)
24 ("Unlike non-capital prisoner who initiate habeas proceedings by filing a petition for a writ of
25 habeas corpus, capital prisoners commence federal habeas proceedings by filing a request for
26 appointment of counsel."); McFarland v. Scott, 512 U.S. 849 (1994).

27 Petitioner does not contend that he is a capital prisoner, that is, a prisoner under sentence
28 of death, and there is nothing in the documents he has submitted which indicates that he is a

1 capital prisoner. If Petitioner wishes to proceed with a habeas action in this Court he must (as
2 is the case with all non-capital prisoners) file a petition for a writ of habeas corpus, which will
3 be given a separate civil case number. However, if Petitioner is in fact a capital prisoner, he may
4 request the Court to re-open this action in order to permit him to file a Petition under the civil
5 case number assigned to this action.


6 Petitioner's Motion for Appointment of Counsel is **DENIED** without prejudice to
7 Petitioner to renew his motion if he initiates habeas proceedings in this Court.

8 **CONCLUSION AND ORDER**

9 This action is **DISMISSED** without prejudice because Petitioner has not filed a Petition
10 and has therefore failed to initiate federal habeas proceedings in this action. The Motion for
11 Appointment of Counsel is **DENIED** without prejudice. If Petitioner is a capital prisoner he
12 may request to have this case reopened. The Clerk of Court shall send Petitioner a blank
13 Southern District of California habeas petition form along with a copy of this Order.

14 **IT IS SO ORDERED.**

15
16 **DATED: August 26, 2010**

17 
18 **IRMA E. GONZALEZ, Chief Judge**
19 **United States District Court**